

## **REMARKS**

### **Claim Rejections**

Claims 10, 16, 19, and 22 are rejected under 35 U.S.C. § 112, second paragraph. Claims 1, 2, 4-8, 10-16, 19, 21, and 22 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Boer et al. (US Pub. 2004/0101035) in view of Girardeau et al. (US 7,099,398). Claims 3, 17, and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Boer et al. in view of Girardeau et al. and further in view of Srikrishna et al. (US Pub. 2005/0129005). Claims 9 and 20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Boer et al. in view of Girardeau et al. and further in view of Adachi (US Pub 2001/0022806).

### **Amendments to Specification**

Applicant has amended the Specification as noted above to cure obvious grammatical and idiomatic inaccuracies. It is believed that the foregoing amendments to the Specification overcome the outstanding objections thereto. No "new matter" has been added to the original disclosure by the foregoing amendments to the Specification.

### **Drawings**

It is noted that the Examiner has accepted the drawings as originally filed with this application.

### **New Claims**

By this Amendment, Applicant has amended claims 10, 11, 16, 19, and 22, and has added new claims 23-26 to this application. It is believed that the new and amended claims specifically set forth each element of Applicant's invention in full compliance with 35 U.S.C. § 112, and define subject matter that is patentably distinguishable over the cited prior art, taken individually or in combination.

### **Claim Rejections – 35 U.S.C. § 112:**

As noted on page 2 of the outstanding Office Action, the Examiner rejected claims 10, 16, 19, and 22 as being indefinite because independent claim 11 states

two "state parameters", each parameter is determined according to at least one characteristic. Accordingly, the Applicant amended claim 11 to specify "at least one first characteristic" and "at least one second characteristic", and then amended claims 16, 19, and 22, so as to specify the first and/or the second characteristic, and eliminate any ambiguity.

The Examiner further noted that it is unclear as to what exactly is the applicant claiming in claims 10 and 22. Accordingly, the applicant amended claims 10 and 22 by using the plural form of the term "times", and amended the claims to read "a number of times of transmitting", as the Examiner read them.

Claim Rejections – 35 U.S.C. § 103:

The Examiner rejected independent claims 1 and 11, *inter alia*, under 35 U.S.C. 103(a) as being unpatentable over Boer et al. in view of Girardeau et al. The Examiner further noted that Boer et al. and Girardeau et al. in combination teaches each and every claim limitation of said independent claims. For the purpose of rebutting the Examiner's rejection, the Applicant would like to highlight the Examiner's rationale regarding the limitation of "determining a state parameter according to at least a characteristic determined by the transmitted packets and the received packets", page 4 of the outstanding Office Action, in claim 1 and similar languages in claim 11. The applicant asserts that Boer et al. and Girardeau et al., combined, actually fail to teach or suggest each and every claim limitation in either claim 1 or claim 11, as required by the well-settled standard of obviousness.

In asserting his rejection, the Examiner, among other things, referred to Figure 1 and paragraphs 4, 6, 7, 19, 20, 23 of Boer et al., and particularly pointed out that the claimed state parameter is read as the signal quality characteristic in Boer et al. The applicant asserts that under such understanding, or any other theory that a skilled artisan may conceive, Boer et al. fails to teach at least the claim limitation of "determining a state parameter according to at least a characteristic determined by the transmitted packets and the received packets".

In paragraph [0020], Boer et al. states:

The receiver 108 preferably derives the SD characteristic by processing an **incoming message**, which can be, for example,

a data frame or a control frame (e.g., an acknowledgment message). (emphasis added).

Boer et al. further states in paragraph [0021]:

The SD indicator may be determined, for example, by measuring a Euclidean distance (i.e., a straight line distance) between known reference constellation points and received constellation points of the SIGNAL field, in accordance with the invention. The closer the received constellation points are to the reference constellation points, the better the signal quality is, and vice versa. Other distance measures can also be used.

FIG. 2A and FIG. 2B, of Boer et al., also illustrate embodiments of the devices for computing the SD indicator. As can be seen from the above-cited portions of Boer et al., Boer et al. merely teach determining signal degradation characteristic or signal quality characteristic by processing an incoming message, which actually means the received data, be it payload or acknowledgment, at the receiver, with methodology such as measuring a Euclidean distance, but never teaches determining a state parameter according to at least a characteristic determined by BOTH the transmitted packets and the received packets, as explicitly required by the language of claims 1 and 11 of the present application. In other words, the applicant asserts that Boer et al. only teach determining signal quality according to information exclusively from received data, but never referencing information in transmitted data, and apparently Girardeau et al. cannot make up this deficiency.

The applicant further takes note in Boer et al., a conventional implementation is discussed, which can be found in paragraphs [0004] and [0023]. In paragraph [0004], for example, Boer et al. states:

A determination as to whether to change the data rate in the transmitter can be made in response to **the number of consecutive acknowledgments** that are received. After a certain number of correctly received data packets, the transmitter typically attempts to switch to a higher data transmission rate. Similarly, after a **certain number of**

**consecutive errors**, the transmitter attempts to switch to a lower data transmission rate. (emphasis added)

By so stating, Boer et al. as its prior technology teaches determining when to switch to a different data transmission rate according to counting a certain number of consecutive acknowledgments or consecutive failing to acknowledge (i.e., errors), which again references only information in the received data, but never satisfactorily teaches referencing information in transmitted data.

Regarding claims 1 and 11, Applicant submits that even if Boer et al. and Girardeau et al. were combined the combination fails to teach "determining a state parameter according to at least a characteristic determined by the transmitted packets and the received packets", which requires both the transmitted packets and the received packets being relied upon when determining a state parameter for transmission rate adjustment, a prima facie case of obviousness has not been established. Withdrawal of the rejections toward independent claims 1 and 11, and all of their accompanying dependent claims is respectfully requested.

Newly Added Claims/Argument Against Srikrishna et al. As Being Prior Art:

By this amendment new independent claim 23 and dependent claims 24-26 have been added. Claim 23 is a combination of all of the claim limitations of originally filed claims 1, 2, and 3. Although the Examiner in his current Action noted that the originally filed claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Boer et al. in view of Girardeau et al. and further in view of Srikrishna et al. (US 2005/0129005), the applicant nevertheless rebuts for the following reasons:

- 1) the originally filed claim 3 (and hence the new claim 23) includes all of the limitations of claim 1, and therefore should be considered allowable for at least the same reason as presented in the rebuttal argument with respect to claim 1; and
- 2) Srikrishna et al. fails to, in terms of the earliest priority document that discloses the subject matter the Examiner relied upon in asserting his rejection, precede the foreign priority date of the present application

under any category of prior art as defined in the various subsections of section 102 of the Patent Laws.

As correctly noted by the Examiner, Srikrishna indeed includes disclosures such as those found in its abstract:

A success ratio of a number of successfully received routing packets versus a number of transmitted routing packets is determined over a period of time T1, for each wireless route.

Albeit it actually being about a technique for determining an optimal route based upon path quality of routes, instead of about transmission rate switching as those discussed in Boer et al., Girardeau et al., and the present application.

Applicant respectfully traverses the rejection of claims 3, 17 and 18 as being rendered obvious over Boer et al. in view of Girardeau et al. and further in view of Srikrishna et al. (US Pub. 2005/0129005). Applicant submits that Srikrishna et al. is not "prior art" under any section of 35 U.S.C. §102 with respect to the instant application. Specifically, the applicant questions the application of the earliest priority date of Srikrishna et al. against the present invention. As stated on the cover sheet of Srikrishna et al., the Srikrishna et al. document is a continuation-in-part of application No. 10/602,439, filed on June 24, 2003, which in turn is a continuation-in-part of application No. 09/751,262, filed on December 29, 2000, now Patent No. 6,704,301. While the applicant will not argue the effectiveness of the 2003 application as being a priority authority for Srikrishna et al., the applicant does question whether extending the effective filing date of Srikrishna et al. to December 29, 2000 is righteously justified. After inspecting the contents of US Patent Application No. 09/751,262, filed on December 29, 2000, and its resultant US Patent No. 6,704,301, the applicant can not locate any mention of the subject matter that the Examiner relied upon in asserting his rejection, i.e., a success ratio of a number of successfully received routing packets versus a number of transmitted routing packets, as otherwise disclosed in Srikrishna et al. This fact indicates that, on the face of the entirety of the records in the case history for Srikrishna et al., one can only reasonably conclude that the earliest date when the relevant subject matter that the Examiner relied upon in asserting his rejection is fully accounted extends no earlier than the filing date of the direct parent application of Srikrishna et al., the US

application No. 10/602,439; that is, no earlier than June 24, 2003. However, the present application has an effective filing date of February 26, 2003, the filing date of the foreign priority document Taiwan patent application No. 092104605. Indeed, even under the standard of the most applicable subsection 102(e), which views the conception of an invention, without further evidence, as to its US patent application filing date, neither the Srikrishna et al. document nor its precedents qualify as prior art for claim rejection purpose against the present application.

As a result, the applicant asserts that the theory of the Examiner's obviousness rejection based on the combination of Boer et al., Girardeau et al., and Srikrishna et al. cannot sustain, for Srikrishna does not qualify as prior art. A quick allowance of the newly added claim 23 and its accompanying dependent claims 24-26 is respectfully requested.

The secondary reference to Adachi teaches a base station apparatus for a radiocommunication network and is cited for teaching whether to use a RTS/CTS mechanism according to at least one of the first and second state parameters.

Adachi does not teach determining a state parameter according to at least a characteristic determined by the transmitted packets and the received packets.

Even if the teachings of Boer et al., Girardeau et al., Srikrishna et al., and Adachi were combined, as suggested by the Examiner, the resultant combination does not suggest: determining a state parameter according to at least a characteristic determined by the transmitted packets and the received packets.

It is a basic principle of U.S. patent law that it is improper to arbitrarily pick and choose prior art patents and combine selected portions of the selected patents on the basis of Applicant's disclosure to create a hypothetical combination which allegedly renders a claim obvious, unless there is some direction in the selected prior art patents to combine the selected teachings in a manner so as to negate the patentability of the claimed subject matter. This principle was enunciated over 40 years ago by the Court of Customs and Patent Appeals in In re Rothermel and Waddell, 125 USPQ 328 (CCPA 1960) wherein the court stated, at page 331:

The examiner and the board in rejecting the appealed claims did so by what appears to us to be a piecemeal reconstruction of the prior art patents in the light of appellants' disclosure. ... It is easy now to

attribute to this prior art the knowledge which was first made available by appellants and then to assume that it would have been obvious to one having the ordinary skill in the art to make these suggested reconstructions. While such a reconstruction of the art may be an alluring way to rationalize a rejection of the claims, it is not the type of rejection which the statute authorizes.

The same conclusion was later reached by the Court of Appeals for the Federal Circuit in Orthopedic Equipment Company Inc. v. United States, 217 USPQ 193 (Fed.Cir. 1983). In that decision, the court stated, at page 199:

As has been previously explained, the available art shows each of the elements of the claims in suit. Armed with this information, would it then be non-obvious to this person of ordinary skill in the art to coordinate these elements in the same manner as the claims in suit? The difficulty which attaches to all honest attempts to answer this question can be attributed to the strong temptation to rely on hindsight while undertaking this evaluation. It is wrong to use the patent in suit as a guide through the maze of prior art references, combining the right references in the right way so as to achieve the result of the claims in suit. Monday morning quarterbacking is quite improper when resolving the question of non-obviousness in a court of law.

In In re Geiger, 2 USPQ2d, 1276 (Fed.Cir. 1987) the court stated, at page 1278:

We agree with appellant that the PTO has failed to establish a *prima facie* case of obviousness. Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching suggestion or incentive supporting the combination.

Applicant submits that there is not the slightest suggestion in either Boer et al., Girardeau et al., Srikrishna et al., or Adachi that their respective teachings may

be combined as suggested by the Examiner. Case law is clear that, absent any such teaching or suggestion in the prior art, such a combination cannot be made under 35 U.S.C. § 103.

Neither Boer et al., Girardeau et al., Srikrishna et al., nor Adachi disclose, or suggest a modification of their specifically disclosed structures that would lead one having ordinary skill in the art to arrive at Applicant's claimed structure. Applicant hereby respectfully submits that no combination of the cited prior art renders obvious Applicant's new and amended claims.

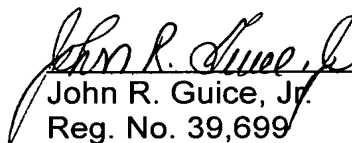
**Summary**

In view of the foregoing amendments and remarks, Applicant submits that this application is now in condition for allowance and such action is respectfully requested. Should any points remain in issue, which the Examiner feels could best be resolved by either a personal or a telephone interview, it is urged that Applicant's local attorney be contacted at the exchange listed below.

Respectfully submitted,

Date: May 29, 2007

By:

  
John R. Guice, Jr.  
Reg. No. 39,699

TROXELL LAW OFFICE PLLC  
5205 Leesburg Pike, Suite 1404  
Falls Church, Virginia 22041  
Telephone: 703 575-2711  
Telefax: 703 575-2707

**CUSTOMER NUMBER: 40144**